No. SC92288

In the Supreme Court of Missouri

JAMES MARCUS HILL,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

Appeal from Montgomery County Circuit Court
Twelfth Judicial Circuit
The Honorable Wesley C. Dalton, Judge

APPELLANT'S REPLY BRIEF

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I.

The trial court erroneously declared and applied the law in reinstating Hill's driving privileges.

1. The Director's Claim of Error is Properly Preserved.

The first point relied on in the Director's opening brief states that:

> The trial court erroneously declared and applied the law in reinstating Hill's driving privileges because the court's judgment is, in reality, an improper collateral attack on Hill's prior conviction for possession of drug paraphernalia, in that the court made no specific findings demonstrating how the actual language of section 302.060.1(9), RSMo was unconstitutionally vague and the court's comments at trial show that it based the judgment on whether the particular item that Hill was convicted of possessing should have qualified as drug paraphernalia under section 195.233, RSMo.

(Appellant's Brf., p. 7).

Hill asserts that the point relied on is an attack on the language of the trial court's judgment, and is thus not preserved because the Director did not file a motion to amend the judgment under Supreme Court Rule 78.07(c).

That argument misconstrues the nature of the Director's claim. The Director is not claiming that the form or language of the judgment was erroneous, or that the trial court failed to make any findings required by statute or rule. Supreme Court Rule 78.07(c), *see also, 8800 Maryland, LLC v. Huntleigh Fin. Srvcs., Inc., et al.*, 292 S.W.3d 439, 446 (Mo. App. E.D. 2009); *Crow v. Crow*, 300 S.W.3d 561, 565-66 (Mo. App. S.D. 2009). The claim raised in the initial brief is that the trial court erroneously declared and applied the law in reinstating Hill's driving privileges on the basis that section 302.060.1(9), RSMo is unconstitutionally vague. That claim goes to the substance, not the form, of the judgment.

The reference to the written judgment in the point relied on was inserted to demonstrate that the written judgment contained nothing to contradict the court's oral comments adopting Hill's constitutional argument that the item of paraphernalia that Hill was convicted of possessing could have been used to ingest legal products, and the record thus demonstrated that those oral comments formed the basis for the court's ruling. *See Pasalich v. Swanson*, 89 S.W.3d 555, 558-59 (Mo. App. W.D. 2002) (ruling that trial court's oral statements in granting motion could be used to explain written order). The Director is not claiming that the court was required by rule or statute to make additional written findings, or that the written findings that were made are insufficient to permit appellate review of the

judgment. The claim that is being made, misapplication of the law, is not the type of claim that must be raised in a motion to amend the judgment in order to preserve it for review. *8800 Maryland, LLC*, 292 S.W.3d at 446.

2. Hill was convicted of an offense related to controlled substances.

Hill freely admits that he was convicted in 2005 for possession of drug paraphernalia. But he nevertheless argues that conviction was not for an offense related to controlled substances that would prevent the reinstatement of his driving privileges under section 302.060.1(9), RSMo. As noted in the Director's opening brief, the Eastern District of the Court of Appeals has previously found that the statute criminalizing the possession of drug paraphernalia, section 195.233, RSMo, is an offense related to controlled substances as that phrase is used in section 302.060.1(9), RSMo. *Mayfield v. Dir. of Revenue*, 335 S.W.3d 572, 573 (Mo. App. E.D. 2011). In reaching that conclusion, the court construed section 302.060.1(9), RSMo to determine the legislature's intent behind the phrase "offense related to . . . controlled substances or drugs . . . ." *Id*. The court further noted that section 302.060.1(9), RSMo, as a remedial statute designed to protect the public, was to be liberally construed to effect its beneficial purpose. *Id*. at 574.

The court concluded that the phrase "related to controlled substances or drugs" under section 302.060.1(9), RSMo "means having some connection to controlled substances or drugs." *Id*. The court further concluded that

under the plain and ordinary meaning of "related to," drug paraphernalia is related to controlled substances or drugs. *Id.* Hill continues to maintain, as he did in the trial court, that the Eastern District's holding was based on the nature of the item of paraphernalia possessed by the defendant, namely a crack pipe. But the court's extensive discussion of the principles of statutory construction as applied to statutory definitions, with only a passing reference to the crack pipe, belies that argument. *Id.*

Hill also attempts an argument that he was not convicted of an "offense" because the item he pled guilty to possessing was legally purchased and because there was no evidence that it was an item directly related to drugs or controlled substances. Besides being an argument that goes to his guilt on the possession charge, and which thus should have been raised during the criminal proceedings, Hill's assertion also relies on a strained interpretation of the word "offense." That term is not defined in Chapter 302, so it is appropriate to look to other statutes concerning the same subject to determine the meaning of the term. *American Nat. Life Ins. Co. v. Dir. of Revenue*, 269 S.W.3d 19, 21 (Mo. banc 2008). The appropriate statutes to look to are contained in the Criminal Code, which defines "offense" as "any felony, misdemeanor or infraction." § 556.061(19), RSMo Cum. Supp. 2008. Possession of drug paraphernalia is, depending upon the controlled substance involved, either a class A misdemeanor or a class D felony. § 195.233.2,

RSMo 2000. Thus when Hill was convicted in 2005 of the class A misdemeanor of possession of drug paraphernalia in violation of section 195.233, RSMo, which again he freely admits, he was convicted of an offense. *See* (L.F. 15). And as noted above, that offense is one that is related to controlled substances or drugs.

3. Section 302.060.1(9), RSMo is not vague.

Hill argues that section 302.060.1(9), RSMo is unconstitutionally vague because it did not give him advance notice that possessing an item that he had legally purchased would later prohibit reinstatement of his driving privileges. But that argument, like the argument made in the trial court, conflates the issue of whether the statutes defining drug paraphernalia and criminalizing its possession are vague, as opposed to a statute that bars reinstatement of driving privileges to a person with a recent conviction for possession of drug paraphernalia.[1] And it overlooks that the provisions of

[1] Hill's argument also ignores the fact that the statute criminalizing possession of drug paraphernalia requires a finding that the item possessed was actually used, or possessed with the intent to use, to "inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of sections 195.005 to 195.425." § 195.233.1, RSMo 2000. To obtain a conviction for possession of drug paraphernalia thus requires the State to

section 302.060.1(9), RSMo are based on the fact of conviction, not on the conduct that led to the conviction. Hill is again trying to collaterally attack his conviction by attempting to relitigate his guilt of the criminal charge for which he was admittedly convicted.

Application to section 302.060.1(9), RSMo of the principles underlying the void for vagueness demonstrate that the statute is constitutional. The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protect against arbitrary and discriminatory enforcement. *Feldhaus v. State*, 311 S.W.3d 802, 806 (Mo. banc 2010). The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Id*.

This Court considered in *Feldhaus* a challenge to a statute defining a chronic DWI offender as a person who has pleaded guilty or been found guilty of four or more intoxication-related traffic offenses. *Id*. at 805-06. The Court found that the statute clearly defined a "chronic offender" and set forth explicit standards necessary for the enhanced criminal penalty that applies

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make a greater showing than mere possession of an item that speculatively could be used to ingest a controlled substance, which seems to be the gist of Hill's argument. *See* (Resp.'s Brf., p. 21).

to a person meeting that definition. *Id*. at 806. Section 302.060.1(9), RSMo likewise makes clear that persons convicted of offenses related to alcohol, controlled substances, or drugs within the ten years preceding a request for reinstatement of driving privileges are not eligible for reinstatement.

Moreover, the statute is not vague when applied to the facts of this case. *Id*. By his own admission, Hill was convicted in 2005 for possession of drug paraphernalia. (Tr. 5). Not only has that offense already been found to be an offense related to controlled substances or drugs, *Mayfield supra*, but the statute under which Hill was convicted is part of the "Comprehensive Drug Control Act of 1989. § 195.005, RSMo 2000. A person of ordinary intelligence would recognize the statute as being one that is related to controlled substances or drugs. *Feldhaus*, 311 S.W.3d at 806.

Hill goes on to describe some hypothetical scenarios that he claims demonstrates the vagueness of section 302.060.1(9), RSMo. As an initial matter, it is inappropriate to project a void for vagueness challenge to factual situations not presented in the case before the Court. *Id*.

Hill's hypothetical scenarios are further flawed because they do not fall within the provisions of the statute. The first hypothetical is a person convicted of passing a bad check who was high on drugs or alcohol at the time he passed that check. Section 302.060.1(9), RSMo does not bar reinstatement for persons convicted of offenses in which alcohol or drugs were involved, it

bars reinstatement for persons convicted of offenses that relate to alcohol or drugs. An offense related to alcohol or drugs is one where the possession, use, sale, etc. of alcohol or drugs or items related to alcohol or drugs is an element of the offense and must be proved beyond a reasonable doubt to obtain a conviction. A person might pass a bad check while under the influence of alcohol or drugs, but being under the influence is not an element that has to be proven to obtain a conviction for that offense.

The second hypothetical that Hill raises is a violation of a city ordinance restricting cigarette smoking. Aside from the question of whether cigarettes and the nicotine they contain would be considered drugs under section 302.060.1(9), RSMo, a violation of a city ordinance does not fall under the statute because an "offense" has to be defined by statute. § 556.026, RSMo 2000.

The trial court erroneously declared and applied the law when it found that section 302.060.1(9), RSMo was unconstitutionally vague and when it reinstated Hill's driving privileges. The judgment should be reversed and remanded with instructions to the trial court to enter an order denying Hill's petition for reinstatement.

II.

Hill's void for vagueness argument was not timely raised.

As noted in the Director's opening brief, Hill's constitutional challenge was raised for the first time during the middle of his closing argument at the hearing on his reinstatement petition. Hill tries to excuse his failure to timely raise his constitutional challenge by shifting the blame to the Director for not appearing at the July 20, 2011 hearing. Hill complains that the Director did not contact the court to advise why it was not appearing for trial. But the Director did send the court a letter dated April 27, 2011, advising that she did not plan to send a representative to the hearing unless requested to do so by the court. (Supp. L.F. 1). The Director advised the court that since the *Mayfield* case that was cited in the answer was on point, the Director had no additional evidence to offer at the hearing. (Supp. L.F. 1; L.F. 18-19). The letter was copied to Hill's attorney, who thus had ample notice that the Director did not plan to appear, yet who took no steps to provide advance notice that he planned to raise a constitutional claim that appeared nowhere in his pleadings.

Hill also argues that his pleadings should be deemed to conform to the evidence because the constitutional issue was tried by express or implied consent. But Hill does not cite to any cases where the tried-by-consent

doctrine has been applied to a proceeding where one party was not present at the proceeding where the issue was raised for the first time. To the contrary, this Court has stated that a consent to trial of an unpleaded defense should not be implied absent a joinder of issue on such defenses. *Schimmel Fur Co. v. American Indem. Co.*, 440 S.W.2d 932, 939-40 (Mo. 1969). As noted in the Director's opening brief, Hill's constitutional claim is in the nature of an affirmative avoidance to an issue raised in the Director's answer, and thus should have been pled in a reply as required by Supreme Court Rule 55.01.

Hill's reliance on *Dye v. Dir. of Child Support Enforcement*, 811 S.W.2d 355 (Mo. banc 1991) also does not aid him. The portion of the opinion to which he cites concerns the question of this Court's authority to consider the constitutional issues raised in the trial court. *Id.* at 357-58. That authority is not being questioned in this appeal. And to the extent that *Dye* can be read as permitting a constitutional claim to be raised in the trial court at any time prior to judgment, it does not stand for the proposition that such a claim can properly be raised and ruled on in the absence of explicit notice to the opposing party. When Hill raised his constitutional claim in his closing argument, the court should at least have continued the hearing to give the Director notice of this new claim and an opportunity to respond. The court erred when it instead ruled on the claim, and that judgment should be reversed. *Callier v. Dir. of Revenue*, 780 S.W.2d 639, 641 (Mo. banc 1989).

CONCLUSION

In view of the foregoing, Appellant submits that the judgment of the circuit court should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 2,466 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 23rd day of March, 2012, to:

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